

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

GEORGE R. DOMBECK, SR.,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency.
(CSF 1 736 149)

DOCKET NUMBER
CH08318910034

DATE: DEC 20 1989

Anthony U. Wacker, Esquire, Minneapolis, Minnesota, for
the appellant.

Reginald M. Jones, Jr., Washington, D.C., for the
agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

The agency has petitioned for review of the January 31, 1989, initial decision that did not sustain its reconsideration decision denying the appellant's application for a survivor annuity. For the reasons discussed in this Opinion and Order, the Board DENIES the agency's petition because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. The Board REOPENS this case on its own motion under 5 C.F.R. § 1201.117, however, REVERSES the

initial decision, and SUSTAINS the agency's reconsideration decision.

BACKGROUND

On November 29, 1987, the appellant applied for a survivor annuity as the surviving spouse of Roberta D. Frederickson, a Federal employee who had died on October 29, 1987. The Office of Personnel Management (OPM) denied the appellant's application in a February 16, 1988, initial decision, finding that the appellant was ineligible for survivor benefits because the deceased allegedly had designated her three children as beneficiaries of her lump-sum retirement contributions.¹ See Appeal File (A.F.), Tab 4, Subtab 4. In a September 26, 1988, reconsideration decision, OPM again denied the appellant's application for survivor benefits, finding this time that he was not entitled to a survivor annuity because his wife had elected an annuity payable only to herself during her lifetime with no survivor benefits payable to her spouse. See A.F., Tab 4, Subtab 6. The appellant voluntarily and irrevocably consented to his wife's annuity election, OPM decided, as evidenced by an official consent form that he had signed in the presence of a notary public on July 8, 1987. *Id.*

The appellant filed a petition for appeal with the Board's Chicago Regional Office, contending that: (1) His

¹ We note, however, that there is no evidence in the record to support OPM's claim that the children are in fact the "designated beneficiaries" of the deceased.

wife's annuity election was invalid because she lacked the mental capacity to execute a valid election; and (2) the appellant had signed a blank consent form before his wife actually made her election and, therefore, had not knowingly consented to her election. After a hearing, the administrative judge found that: (1) OPM's reconsideration decision could not be sustained because a preponderance of the evidence established that the deceased did not have the mental capacity to execute a valid annuity election when she applied for retirement; and (2) in light of his wife's mental incapacity, the appellant's right to a survivor annuity had not been "jointly" waived under 5 U.S.C. §§ 8341(b)(1) and 8339(j)(1).² The administrative judge consequently ordered OPM to grant the appellant's application for a survivor annuity.

ANALYSIS

The appellant did not prove by preponderant evidence that his wife was mentally incompetent when she elected an annuity without survivor benefits.

The Civil Service Retirement Act provides that an annuity for an employee who is married at the time of retirement must be reduced to provide a spousal survivor annuity unless the employee and her spouse "jointly waive"

² The administrative judge found that the fact that the appellant signed the spousal consent form in blank one month before his wife made her annuity election was of limited probative value in determining her mental competence because the appellant was aware at the time that he signed the consent form that his wife's medical condition was rapidly deteriorating.

the spouse's right to a survivor annuity. See 5 U.S.C. §§ 8339(j)(1) and 8341(b)(1). Annuity elections are only valid, however, if made by mentally competent individuals. See *Pooler v. Office of Personnel Management*, 23 M.S.P.R. 51, 53 (1984). It is the appellant's burden, as the applicant for benefits and as the individual seeking to change the annuity agreement of record, to prove the fact of his wife's mental incapacity and his consequent entitlement to a survivor annuity. See *Cheeseman v. Office of Personnel Management*, 791 F.2d 138, 140-41 (Fed. Cir. 1986), cert. denied, 107 S. Ct. 891 (1987); *Pooler*, 23 M.S.P.R. at 53 n.3.

Here, the appellant's argument in support of his claim of entitlement to a survivor annuity is that his wife was mentally incompetent at the time that she elected an annuity payable only to herself during her lifetime with no survivor benefits payable to her spouse. Notwithstanding the absence of any medical evidence of mental incapacity in the record, the administrative judge found that the appellant, through his un rebutted testimony (OPM did not participate in the hearing), had proven by preponderant evidence that his wife did not have the mental competence to execute a valid annuity election when she applied for retirement.

In reviewing an initial decision, the Board is free to substitute its own determinations of fact for those of the administrative judge, giving the administrative judge's findings only as much weight as may be warranted by the

record and strength of the administrative judge's reasoning. See *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133 (1980), *aff'd*, 669 F.2d 613 (9th Cir. 1982) (*per curiam*). In the instant case, the administrative judge's findings are not supported by a preponderance of the evidence of record and, consequently, do not merit the Board's deference.

Although the appellant's version of his wife's condition is un rebutted by any other documentary or testimonial evidence, we are unable to find that his testimony, without more, constitutes preponderant evidence of his wife's alleged mental incapacity at the time of her annuity election. The appellant's wife had terminal cancer at the time of her retirement and annuity election. She had undergone a course of radiation treatment for her cancer prior to her retirement, and was taking various medications (including narcotic analgesics and corticosteroids) to alleviate the pain and the mental depression caused by her condition up until the time of her death. See A.F., Tab 10. Although the appellant testified that his wife's illness caused her to make inappropriate selections while playing cards, to stop participating in activities (such as reading the "Racing Form," wagering on horse races, and playing bingo) for which she had previously shown a high degree of interest, and to overdraw her checking account as the result of failing to document the amounts of all of her checks, we cannot find that these occurrences, without more, demonstrate that his wife was of significantly diminished

mental capacity at the time of her annuity election. We therefore conclude that Roberta D. Frederickson's choice of an annuity payable only during her lifetime constituted a valid annuity election. Further, because there is nothing to show that the appellant was in any way misinformed or unaware of the consequences of his actions when he signed the spousal consent form, we conclude that the appellant's right to a survivor annuity was "jointly waived" under 5 U.S.C. §§ 8339(j)(1) and 8341(b)(1).³

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction.

³ In its petition for review, OPM contends that the administrative judge erred "by not inviting the three children of the deceased, [allegedly] designated as beneficiaries of her lump-sum retirement contributions under 5 U.S.C. § 8342(c), to participate in the proceedings as permissive intervenors." See Petition for Review at 1. This argument is raised for the first time in OPM's petition for review and, consequently, does not merit the Board's consideration at this time. See *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980) (the Board will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence). In any event, our reversal of the initial decision leaves unaffected any interests of the children of the deceased.


See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Washington, D.C.


Robert E. Taylor
Clerk of the Board